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76-5258

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-2349

TYREES COLOZA WHITEHEAD,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT
FROM THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

76-6258

TYREES COLOZA WHITEHEAD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Tyrees Coloza Whitehead, by counsel, petitions this Court for a Writ of Certiorari to the judgment of the United States Court of Appeals rendered on January 21, 1977.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court was entered on January 21, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTION PRESENTED

Whether petitioner could legally be convicted of violations of 18 U.S.C. §2113(a) and (d) and 18 U.S.C. §924(c)(1) and (2) and be sentenced for separate offenses.

STATEMENT OF FACTS

Petitioner was indicted on four counts relating to an armed bank robbery with four others. He and three others were jointly tried by jury. He was convicted of violating 18 U.S.C. §2113(a) and (d) for which he received a twenty year sentence. He was convicted of violating 18 U.S.C. §924(c)(1) and (2) for which he received a five year consecutive sentence.

As to the issue raised herein the Government's evidence showed that three persons entered the Shaefer Street Branch of United Virginia Bank, Richmond, Virginia. Two weapons, a sawed-off shotgun and a snub nose pistol, were

displayed. The branch manager testified that he felt his life was in jeopardy.

REASON FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals relying on two of its recent opinions, United States v. Crew, 538 F. 2d 575 (1976) and United States v. Mathis, 538 F. 2d 326 (1976) rejected petitioner's argument and affirmed his conviction. (Opp. pg 16).

In the present case the two convictions upon which petitioner was sentenced were an 18 U.S.C. §2113(d) violation--bank robbery while putting a life into jeopardy by the use of a dangerous weapon and a 18 U.S.C. §924(c)(2) violation--the unlawful carrying of a firearm during the commission of the bank robbery felony. Petitioner argues, as did the unsuccessful defendant in Crew, serpia, that the §2113(d) conviction precludes a conviction and separate sentencing under §924(c)(2).

The basis of the argument is that the dual conviction and sentence violates the Fifth Amendment protecting against double jeopardy. As a principle of logic petitioner submits that there is no way a person may use a dangerous weapon in a bank robbery putting a person's life in jeopardy without carrying the weapon during the bank robbery. The objection is to the pyramiding of charges where a bank robbery with a firearm is involved.

The issue raised presents a significant question of Congressional intent in the enactment of 18 U.S.C. §924(c) and perhaps more importantly the question of double jeopardy in bank robbery prosecutions where a firearm is alleged to be used. While as yet no difference exists in Circuit Court opinions, the importance of the issue is perceived as one in which a substantial question is presented concerning the law of double jeopardy.

In order for the prosecution to establish a §2113(d) violation of use of the gun it must first show the carrying of the gun. Carrying is therefore a crucial element of the §2113(d) offense and cannot by logic or constitutional principle be made the basis of a separate punishable offense. The Fourth Circuit in Crew saw the validity of this argument in regard to that defendant's claim that he could not be dually sentenced for a §924(c)(1) use of the gun

and a §924(c)(2) carrying of the gun. If the use-carry argument of petitioner would prevail within §924 it should also prevail between §924(c)(2) and §2113(d).

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for Writ of Certiorari be granted.

TYREES COLOZA WHITEHEAD

By _____
Counsel

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Richmond, Virginia 23220

The Appendix has not been filmed. It appears at 549 F.2d 942.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

TYREES COLOZA WHITEHEAD, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.76-6258

TYREES COLOZA WHITEHEAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his conviction for aggravated bank robbery under 18 U.S.C. 2113(d) precludes a simultaneous conviction and consecutive sentence for using a firearm during the robbery, in violation of 18 U.S.C. 924(c)(1).[1/]

1/ 18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;
>
> * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. 924(c) provides:

> Whoever--
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or

(continued)

1. The judgment of the court of appeals was entered on January 21, 1977. The petition for a writ of certiorari was not filed until February 23, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.

2. Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to commit bank robbery (Count One), aggravated bank robbery (Count Two), using a firearm during the commission of the robbery (Count Three), and of unlawfully carrying a firearm during the robbery (Count Four), in violation of 18 U.S.C. 371, 2113(d), 924(c)(1) and 924(c)(2).[2/] He was sentenced to consecutive terms of twenty years' imprisonment on Count Two and five years' imprisonment on Count Three.[3/] The court of appeals affirmed (Pet. App.).

The evidence, which is not here in dispute, showed that on January 6, 1975, the Shaefer Street Branch of the United Virginia Bank of Richmond, Virginia, was robbed by petitioner and two others at gunpoint. They took approximately $73,890 from the bank.

3. The issue here is whether Congress intended that a conviction under Section 2113(d) would bar an additional conviction and multiple punishment under Section 924(c)(1). The identical issue is presented in the petitions for a writ of certiorari in Michael Lee Simpson and Tommy Wayne Simpson v. United States, No. 76-5761, and Michael Lee Simpson v. United States, No. 76-5796,

1/ (continued)
> subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of the law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of the felony.

2/ The four-count indictment also charged five others with the commission of these offenses. Two co-indictees, Antonio Hicks and Robert Charles, pleaded guilty, and petitioner, Maurie Vaughan, Elijah Ivory, Joe Grant and Stanley Evans were tried jointly. Evans was acquitted by the jury. Vaughan and Grant were found guilty and received sentences identical to petitioner's. Their convictions were affirmed by the court of appeals. Grant has filed a petition for a writ of certiorari to this Court (No. 76-6463) raising issues not relevant here.

3/ The trial judge imposed no sentence on Count one or Count four.

certiorari granted, April 18, 1977.[4/] In the circumstances, it would be appropriate to defer disposition of this petition until the Court has decided Nos. 76-5761 and 76-5796.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

APRIL 1977.

4/ We did not oppose the grant of certiorari in Simpson, since the circuits are in conflict on the issue. Nevertheless, for the reasons stated in our memorandum acquiescing in the grant of certiorari there we submit that the court of appeals here correctly concluded that separate convictions and sentences are appropriate for violations of Sections 2113(d) and 924(c) committed in the course of the same bank robbery. We are sending a copy of our memorandum in Simpson to petitioner.